IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 228 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? YES

2 To be referred to the Reporter or not ? YES

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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STATE OF GUJARAT - Applicant(s)
Versus
SHAILENDRA KAMALKISHOR PANDE & 4 - Respondent(s)

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Appearance :

MR KC SHAH, APP for Applicant.

MR JB PARDIWALA for the Complainant.
MR YOGESH S LAKHANI for the Respondents.

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 29/06/2007

CAV JUDGMENT

1. The applicant-State of Gujarat has filed this Criminal Revision Application under Section 397 of the Code of Criminal Procedure with a prayer that this Court may be pleased to quash and set aside the order dated 16.4.2007 passed by the learned Sessions Judge, Fast Track Court No.6, Vadodara below application Exh. 292 in Sessions Case No.172 of 2004.

2. By the impugned order, the learned Sessions Judge, Fast Track Court No.6, Vadodara, permitted the defence to produce a C.D. which contains an interview of the victim at the end of a local T.V. Channel. The learned Judge further permitted the defence to produce the C.D. and play the same on a C.D. Player before the Court so that the Court may be able to listen to the questions which were put by the local T.V. Channel. By the said application Exh. 292, the learned advocate for the accused stated that in the aforesaid matter the cross-examination of witness Ashutosh is going on. After the incident Ashutosh has given an interview in local T.V. Channel regarding the incident in question. When the attention of the witness was drawn towards it, he stated that he did

not remember anything. This piece of evidence was in connection with the incident in question. In view of the same, his statement is recorded to show the said C.D. and therefore, the learned advocate for the accused has stated that they may be allowed to produce the said C.D. and the C.D. player in the Court and therefore prayed that during the cross-examination of Ashutosh, the Court may permit the recorded T.V. interview be shown in this behalf.

2.1 The learned Judge has passed order in connection with the offences punishable under Section 341 of the Indian Penal Code which provides wrongful confinement, Sec. 364-A which provides kidnapping for ransom, Sec. 506(2) which provides punishment for criminal intimidation, Sec.120-B of the IPC which provides punishment of criminal conspiracy and under Secs.25(1)(a) and 25(1)(b) of the Arms Act wherein the learned Sessions Judge was pleased to allow the application Exh.292 filed by the accused.

3. The facts giving rise to this application are as under:-

3.1 It is the case of the prosecution that the accused No.1 Shailendra Kamalkishor Pande, accused No.2 Shasanka Madanlal Goyel, accused No.3 Ruturaj Bhudeshwar Bhoda, accused No.4 Somashish Dipakkumar Adhyapak and accused No.5 Karsihma Bipinbhai Jadhav, all these accused persons kidnapped a minor child namely Ashutosh Ashokbhai Shah who was 14 years old at the time of commission of offence i.e. On 15.12.2003. It is the case of the prosecution that on 15.12.2003 the victim Ashutosh went to school by an auto rickshaw around 7.30 A.M. along with other students. While proceeding to the school, the accused No.1 to 4 came with lethal weapon like Tamancha, iron pipe, iron patti etc., in a Maruti Car and kidnapped the minor.

3.2 A police compliant was lodged by the rickshaw driver Shri Shivabhai Mahjibhai Parmar with Gorva Police Station on 15th December, 2003. The accused persons took the minor Ashutosh to

Chandravila Apartment, Vadodara where they kept the minor from 15th December, 2003, to 20th December, 2003. The accused persons contacted the parents and demanded a sum of Rs.1.00 crore for releasing the minor, through telephone calls from various places. On 20th December, 2003, the police find out the location of the victim through accused No.5 and at 11.00 to 11.30 P.M., the police rescued the minor. At that time the accused No.1 was present with the minor victim and police arrested the accused No.1 and 5. Thereafter, during the course of investigation the police also arrested the accused No.2, 3 and 4.

3.3 After completion of the investigation, the police submitted the charge sheet before the learned Chief Judicial Magistrate Vadodara, who in turn committed the case before the Sessions Court at Vadodara. The learned Sessions Judge was pleased to frame the charges and necessary trial has commenced in this case.

3.4 During the course of trial, number of witnesses have been examined by the prosecution.

While cross-examining the minor victim Ashutosh by the defence side, an application was submitted by the accused side Exh.292 and prayed to show the interview cassette of victim Ashutosh and his father to the minor Ashutosh, which was taken by the local news channel namely “TNN” on 21.12.2003. Some part of this interview was telecast by the TNN News (local news channel).

3.5 It appears that the defence wanted the trial Court to watch the CD and hear the entire conversation which took place between the victim and the local TV channel who were putting certain questions to the victim immediately after he was rescued by the police. The prosecution vehemently objected and opposed the application contending that it was not permissible for the accused persons to adduce any such evidence in the form of a CD and also contended that it would not be open for the trial court to watch the CD on a CD player. The prosecution also contended that the evidence of the prosecution was not yet over and if the accused persons wanted to lead any evidence they could lead

only after they enter the stage of defence and that too after satisfying the court as regards the genuineness and the accuracy of the CD. It was submitted that the subject matter recorded in the CD has to be shown to be relevant according to rules and relevancy found in the Evidence Act. It was also submitted that accuracy of what was actually recorded had to be proved by the maker of the record and circumstantial evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.

Trial Court Findings:

3.6 The trial Court, after considering the submissions of the defence as well as the prosecution, came to the conclusion that any statement made by the victim after he was rescued by the police in connection with the prosecution case can be termed as his previous statement which would be a very relevant fact and the witness can be contradicted with his previous statement to impeach his credibility and the veracity of the prosecution case. The trial Court also came to the conclusion

that for a just and fair trial, the Court should not shut any evidence which would have a bearing on the entire case. The trial court also recorded a finding relying upon the decision of the Hon'ble Supreme Court in the matter of **Zahira Shaikh vs. State of Gujarat reported in 2004(2) GLR 1078** that if any fact relating to the truth of the prosecution case can be brought on record by any means, then the Court should not prevent the party from adducing such evidence. The trial court finally discussing Sec.145 and Sec.155 of the Evidence Act allowed the application and permitted the defence to produce the CD and play the CD on a CD player before the Court.

3.7 Being aggrieved and dissatisfied with the order passed by the learned Sessions Judge, Fast Track Court No.6, Vadodara, the revision application was filed by the State somewhere on 1.5.2007.

3.8 When the matter was placed for hearing before this Court, on 2.5.2007 this Court has passed a short but speaking order and also granted interim relief regarding stay of implementation, operation

and execution of the order dated 16.4.2007 passed by the learned Sessions Judge, Fast Track Court No.6, Vadodara in application Exh.292 in Sessions Case No.172 of 2004. In the said order it was stated that the interim relief was granted only qua regarding application Exh.292 in Sessions Case No.172 of 2004 and it is open for the learned Judge to proceed further and examine other witnesses except Mr.Ashutosh Ashokbhai Shah and interim relief to continue till 7.5.2007. Thereafter this Court pleased to pass the orders on 9.5.2007, 11.5.2007 and 16.5.2007.

3.9 The matter was placed for hearing before this Court on 13.6.2007. Hence Rule. I have heard Mr.K.C. Shah, learned APP on behalf of the State of Gujarat. On behalf of accused I have heard Mr.Yogesh S.Lakhani, learned advocate and on behalf of original complainant I have heard Mr.J.B.Pardiwala, learned advocate who has tried to assist the Court as important and interesting question of law arises. With the consent of the parties, the matter is taken up for final hearing.

4. **Learned APP Mr.K.C.Shah has made following submissions**.

4.1 He submitted that the learned Sessions Judge ought to have seen that as per the Indian Evidence Act as well as the decisions rendered by the Hon'ble Supreme Court in various cases. The cassette submitted by the defence side cannot be acceptable, more particularly when the cross-examination is going on of the said witness. The trial court cannot grant such permission to show the video cassette and permit to ask the questions to witness, which may result into contradiction in the case. It is submitted that the minor Ashutosh has clearly stated that he does not remember about the interview given by him to any agency.

4.1A The learned APP further submitted that the learned Sessions Judge ought to have seen that if the cassette of said interview is required to be submitted before the trial court by the accused side, then it must be submitted from the proper custody of

it and can pray as production witness. So the application at Exh.292 given by the defence is premature.

4.2 The learned APP stated that in the present case, the trial court ought to have appreciated the question of authenticity of the cassette but this authenticity is not examined by the trial court and the order passed by the learned trial Judge dated 16.4.2007 allowing the application Exh.292, held that the defence can shown the evidence which has been stated in Exh.292 to the witness concerned.

4.3 The learned Judge ought to have considered the fact that number of witnesses have examined in the matter and minor Ashutosh is also giving deposition after completing examination-in-chief. He has categorically stated that he does not remember whether he had given any interview to any agency or not. He has also stated that after seeing the interview he can make statement on the floor of the Court. On lap top the defence advocate wants to show something to reminder him about the interview which

is not permissible under the provisions of law.

Submissions of Mr.J.B.Pardiwala.

5. Mr.Jamshed B.Pardiwala, learned advocate stated that he has instructions from the complainant side. However, he stated that he do not want to address anything on the merits of the matter because the learned APP has already addressed the Court but as the revision application raises very important questions of law, he would like to assist the Court by citing some relevant judgments of the Hon'ble Supreme Court. That is how the Court permitted Mr.J.B.Pardiwala, learned advocate to appear and address in this behalf.

5.1 He has relied upon the Constitution Bench judgment of the Hon'ble Apex Court in the case of **N.Sri Rama Reddy and others vs. V.V.Giri reported in AIR 1971 SC 1162** where the Hon'ble Apex Court in para 22 on page 1169 has observed like this:

"Having due regard to the decisions referred

to above, it is clear that a previous statement made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last-mentioned matters, under Section 146(1), Exception 2 to Section 146(1), Exception 2 to Section 153 and Section 155 (3) of the Evidence Act."

5.1A However, in para 27 on page 1170 the Hon'ble Apex Court has observed like this:

"We once again emphasize that this order relates only to the admissibility in evidence of the conversation recorded on tape and has not dealt with the weight to be attached to that evidence."

5.2 He has also relied upon judgment of the Hon'ble Supreme Court in the case of **Yusufalli Esmail Nagree vs. The State of Maharashtra reported in AIR 1968 SC 147** particularly para 6 on page 149 the Hon'ble Supreme Court has observed like this:

> “.... If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with.”

5.3 He has also relied upon another judgment of Hon'ble Supreme Court in the case of **Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdass Mehra and**

others reported in AIR 1975 SC 1788 particularly para 1975 which reads as under:

> "We think that the High Court was quite right in holding that the tape records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions:
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> (a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
>
> (b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.
>
> (c) The subject matter recorded had to be

shown to be relevant according to rules of relevancy found in the Evidence Act.

These requirements were deduced by the High Court from R. v. Maqsud Ali, (1965) 2 All ER 464."

5.4 He has also relied upon another judgment of Hon'ble Supreme Court in the case of **R.M.Malkani vs. State of Maharashtra reported in AIR 1973 SC 157** particularly para 23 on page 163, para 27 on page 163 and para 29 on page 163 & 164 which reads as under:

"23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is provided by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence

Act. It is *res gestae.* It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr.Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence."

"27. When a Court permits a tape recording to be played over it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. The fact that tape recorded conversation can be altered is also borne in mind by the Court while admitting it in evidence."

> “29. If the conversation was recorded on the tape it was a mechanical contrivance to play the role of an eavesdropper. In R. v. Leatham, (1861) 8 Cox C.C. 198 it was said “It matters not how you get it if you steal it even, it would be admissible in evidence” as long as it is not tainted by an inadmissible confession of guilt: evidence even if it is illegally obtained is admissible.”

5.5 **What is meant by *res gestae*.**

5.5A The *res gestae* as per Trayner's Latin Maxims on page 551 defines that the thing done; the whole transaction or circumstance. This phrase, which is of very frequent occurrence, signifies not only an act performed, but everything said or done at the time bearing upon or having reference to it. Thus it includes all statements made immediately before or immediately after any particular act so nearly connected with it in point of time as to be inseparable parts of the whole transaction, and

incapable of omission from any narrative or testimony professing to be an account of it.

Submission of Mr.Y.S.Lakhani, learned advocate for the respondents-accused.

6. On the other hand, Mr.Y.S.Lakhani, learned advocate has supported the reasonings of the learned trial Judge. He has submitted that the trial Court has committed no error in allowing the application Exh.292 and thereby permitting the defence to produce the C.D. in question and play the same on a CD Player before the trial Court. The learned advocate further submitted that the conversation between the victim and the person who interviewed the victim is admissible, provided that the conversation is relevant to the matters in issue, that there is identification of the persons in dialogue and that the accuracy of the conversation is proved by eliminating the possibility of any manipulation or fabrication. The learned advocate further submitted that all relevant conversation is a relevant fact and is admissible under Sec.8 of the Evidence Act which

provides motive, preparation and previous or subsequent conduct. It was submitted that it is *res gestae.*

6.1 It was also submitted that it is also comparable to a photograph of the relevant incident. The conversation is therefore a relevant fact and is admissible under Sec.7 of the Evidence Act which provides facts which are the occasion, cause or effect of facts in issue. It was vehemently submitted by the defence side that by allowing the CD to be played on CD player the Court is not deciding anything finally and whether the evidence in the form of CD is relevant or not and whether it is legally admissible or not would be taken into consideration by the trial Court while appreciating the entire evidence at the final stage. It was submitted that finality can be attached to this piece of evidence and therefore the prosecution is not at loss or it cannot be said that the prosecution is prejudiced in any manner.

6.2 It was further submitted that admissibility of

a document is one thing and its probative value quite another. These two aspect cannot be combined. A document may be admissible and yet may not carry any conviction and weight or its probative value may be nil. The learned advocate further submitted that the objection of the prosecution is with regard to the mode of proof which is sought to be adduced by the defence and ultimately if the trial court even after permitting the CD to be played and even after exhibiting the same can come to the conclusion that no importance can be attached to such a piece of evidence. It was also submitted that even if evidence is illegally obtained, it is admissible. The Court will take care in two directions in admitting such evidence. First, it will find-out that it is genuine and free from tampering or mutilation. Secondly, it may also secure scrupulous conduct and behavior on behalf of the accused persons.

7. Findings & Conclusion:

7.1 The short but interesting point of law which arises for consideration is as to whether the trial

court has committed any serious error in allowing the application Exh.292 and thereby permitting the defence to put forward the CD containing interview of the victim on a local TV Channel and watch the same on the CD player. There cannot be any dispute as regards the fact that CD containing the interview of the victim on a local TV channel will follow within the ambit of “Document” as defined in Sec.3 of the Evidence Act. So far as the CD is concerned this being an electronic record, provisions of Sec.65-A and 65-B of the Evidence Act will be applicable. Sec.65-A provides special provisions as to evidence relating to electronic media and Sec.65-B provides admissibility of electronic records which reads as under:

Sec.65B “Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a

document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible."

7.2 CD itself is primary and direct evidence admissible as to what has been said and picked-up by the recorder. A previous statement made by a witness and recorded on tape, can be used not only to corroborate the evidence given by the witness in the Court but also to contradict the evidence given before the Court as well as to test the veracity of the witness and also to impeach his impartiality. Thus, apart from being used for corroboration, the evidence is admissible in respect to other three matters i.e. Under Sec.146(1) of the Evidence Act which provides questions lawful in cross-examination. The said section provides that when a witness is cross-examined, he may, in addition to the questions

hereinbefore referred to, be asked any questions which tend to test his veracity. Sec.153 provides exclusion of evidence to contradict answers to questions testing veracity. In that behalf Sec.153 is relevant and Exception 2 of said section is also relevant which provides that if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted. For ready purpose, Sec.153 and Exception 2 of Sec.153 which reads as under:

> "S.153 When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.
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> Exception 1 – If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

> Exception 2 – If a witness us asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.”

7.3 Sec.155 of the Evidence Act provides impeaching credit of witness. Sec.155 provides that the credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him, particularly sub-clause 3 which provides that proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

7.4 The weight to be given to such evidence is however distinct and separate from the question of its admissibility. Assuming for the moment that the trial Court admits some evidence contrary to the rules of evidence or the provisions of the Evidence Act by merely exhibiting the same or by merely admitting the same no final conclusion is drawn or decision is taken on such evidence. The defence is

ultimately obliged to establish by cogent evidence as regards the genuineness of the CD, as to how the CD was prepared, by examining the person who prepared the CD and who authenticates the same as regards the true nature of the same. It is only after the defence discharges this obligation that the trial court would be in a position to consider it as a piece of evidence. Therefore, at this stage when the question is as regards to admissibility of a document in the form of a CD by the defence, there should not be any serious objection because the trial court will consider the relevancy of the same and the authenticity of the same at the final stage while appreciating the entire evidence on record.

7.5 In this behalf I also refer to the provisions of Sec.136 of the Evidence Act which provides Judge to decide as to admissibility of evidence which reads as under:

> “S.136 When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved,

would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and, the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."

7.6 Section 136 of the Evidence Act is very clear. Of course, the trial Court has not considered this

provision and this is the provision which the trial court should have considered and after considering the same should have allowed the application Exh.292. One another important aspect which needs to be noted is that if the victim himself after watching the CD admits having answered the questions put to him by a local TV channel then under such circumstances the entire controversy comes to an end. It is not the case that the production of the CD per se is inadmissible in evidence. But the issue is with regard to the genuineness of the same which can be established by the defence by giving a proper undertaking to the trial court as per Sec.136 of the Evidence Act. The judgment of the Hon'ble Supreme Court in the case of **State of Bihar and others vs. Sri Radha Krishna Singh and others reported in AIR 1983 SC 684** relevant para 40 on page 695 is the answer to the said question which reads as under.

> “... We may not be understood, while holding that Ex. J., is admissible, to mean that all its recitals are correct or that it has very great probative value merely because it happens to be an ancient document.

> Admissibility of a document is one thing and its probative value quite another – these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil."

7.7 The Hon'ble Supreme Court in the aforesaid judgment has explained that admissibility of a document is one thing and its probative value quite another. These two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil. While holding that this order relates only to the admissibility in evidence of the CD in question and has not dealt with the weight to be attached to that evidence which is left to the trial Court to decide the same in accordance with law. The order can be modified to the extent that before permitting the CD to be produced and played before the Court, the Court may insist that the entire dialogue i.e. questions and answers be reduced in writing in the form of a transcript authenticated by a responsible person who had recorded the entire conversation and after seeking necessary undertaking

in this regard from the defence the trial Court may proceed further with the examination of Ashutosh. I rely upon the judgment of Calcutta High Court in the case of **Rakhaldas Pramanick vs. Sm. Shantilata Ghose and others reported in 1956 Calcutta page 619**, delivered by Justice P.B. Mukharji (as he was then) and in para 4 the learned Judge has observed like this:

> "Now documentary exhibits on the Original Side appear on the record in the following manner. When a party proves a document through a witness, he tenders that document after such proof and then the Court marks it as exhibit. Ex hypothesi, exhibit means a document exhibited for the purpose of being taken into consideration in deciding some question or other in respect of the proceeding in which it is filed."

7.8 After relying upon the aforesaid judgment, our High Court in the matter of **State of Gujarat vs. Gaurang Mathurbhai Leuva reported in 1999(2) GLH 564** while explaining the meaning of the word "exhibit"

and the effect of exhibiting a particular document as held in para 5 as under which has a lot of bearing so far as the present case is concerned.

> “Let me therefore make it clear that the document when it is exhibited the Court while exhibiting the same does not finally decide the rights of the parties, or form any opinion, or express any opinion on the document or on the point that arises for consideration. In short, no legal complexion is given to the issues that arise for consideration. After the hearing is over, while finally adjudicating, the Court is free to discard a particular document holding that it was not duly proved or holding that the document was partly proved namely, execution along thereof was proved, but as the contents thereof were not proved, the same cannot be taken into account. If either of the parties later on files during the course of the hearing an application to expunge the document admitted in record, the Court may hearing the parties expunge the same if it finds that the document is not legally and

correctly proved and exhibited. In short, by exhibiting the document merits or demerits thereof are not dissected, and the rights and obligations of the parties are not finally decided, or legal complexion is not given to the issue that arises for consideration as giving exhibit to the document is the procedural aspect of the matter and it merely shows that document is formally proved. The rights and obligations of the parties are to be decided while finally appreciating the evidence for the purpose of pronouncing final verdict."

Section 364A:

7.9 The aforesaid section is for kidnapping for ransom. The said section was introduced by Act 42 of 1993 by Section 2 which was introduced somewhere in 1993 with effect from 22.5.1993. This section was subsequently amended in 1995 by Act 24 of 1995 with effect from 26.5.1995. The section provides punishment for kidnapping, abduction or detaining for ransom.

7.10 At this juncture I also refer to object and reasons for introducing the said bill because according to object and reasons is also very important in this behalf which reads as under:

> " I refer to Bill No. LXXVIII of 1992. A Bill further to amend the Indian Penal Code and the Code of Criminal Procedure, 1973 particularly when Section 364A has been introduced. I refer to the Statement of Objects and Reasons made while introducing Section 364A of the Act which is published in Government Gazette Extraordinary on page 44 which reads as under:
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> "Kidnappings by terrorists for ransom, for creating panic amongst the people and for securing release of arrested associates and cadres have assumed serious dimensions. The existing provisions of law have proved to be inadequate as deterrence. The Law Commission in its 42nd Report has also recommended a specific provision to deal with this menace. It is necessary to amend

the Indian Penal Code to provide for deterrent punishment to persons committing such acts and to make consequential amendments to the Code of Criminal Procedure, 1973."

7.11 I have considered the facts and circumstances of the case. I have also considered Sec.364-A of the IPC. This section has been introduced by way of amendment, providing severe punishments in cases where the offence of abduction or kidnapping is done or the person is kept continuously under detention and the accused threatens to cause death or hurt to such a person detained or creates a reasonable apprehension that such person may be put to death or hurt or causes hurt or death in order to compel the Government or any foreign state or international governmental organisation to do or abstain from doing an act or to pay a ransom as demanded by the accused. In this behalf I have also considered Sec. 364A of the Indian Penal Code. This Section provides punishment with death or imprisonment for life and also liable to fine. The offence committed by this Section is cognizable and non-bailable and triable

by Court of Session. The aforesaid offence is also non-compoundable. This shows that the legislature is of the view that the offence committed under this Section is very serious offence and in today's condition we hear the news everyday that this type of offence is committed and therefore the Court should take a serious view of the matter.

7.12 In this behalf I also refer to the judgment of the Hon'ble Supreme Court in the case of Malleshi vs. State of Karnataka reported in (2004) 8 SCC 95 where Section 364A has been considered by the Hon'ble Apex Court particularly paras 7, 8, 9, 10, 11, 12 and 13 on page 98 and 99. The learned Judge while considering Section 364A will also consider the aforesaid judgment also.

7.13 Regarding evidentiary value of CD:

7.13A Section 161 of Code of Criminal Procedure provides examination of witnesses by police. Under this provision of Code, a police officer making an investigation can examine the person acquainted with the facts of the case, and reduce the statement made by such person into writing. The statements recorded

under this section have only a negative value as they can be used only to contradict a witness. Section 162 of Code provides statements to police not to be signed. Use of statements in evidence. Under this Section of Code it ensures that no statement made to the police which is reduced to writing be signed by the person who makes it and that no such statement or any record of such a statement, whether in a police diary or otherwise or any part of such statement or record shall be used for any purpose other than those stated in the Section. They may be used by the accused or by the prosecution to contradict such witness in the manner provided by S. 145 of the Indian Evidence Act, 1872 and when it is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination of such witness. It means that statements made to the police can be used for contradicting a prosecution witness in the manner indicated in S. 145 of the Evidence Act. Now the impugned C.D. is not a statement as recorded as per Sections 161 and 162 of the Code of Criminal Procedure. So the said C.D. Can be used either to contradict or corroborate the evidence recorded therein.

7.13B Ashutosh has deposed before the Court that he has not remembered anything that he has given such interview. Upon such circumstances, this is not the stage where defence can be permitted to adduce such evidence of C.D. and the recorded version therein. Further at this situation, the defence cannot be permitted to produce the C.D. before the Court either to corroborate or contradict the evidence of Ashutosh. The defence can examine the defence witness at proper stage and get the C.D. produced by proper witness and also thereafter prove the authenticity and the genuineness of the C.D. The defence to prove that the said C.D. is not tampered with and is the original C.D.

7.13C As per the judgment of the Hon'ble Supreme Court which this Court referred earlier, once it is proved that the C.D. which is sought to be produced is not tampered with, the defence can be permitted to use the said C.D. and at that time, if the Court satisfies about the authenticity and the genuineness of the C.D., the Court may permit the defence to recall the witness as per Section 311 of the Code of Criminal Procedure which provides power to summon

material witness or examine person present. This Section provides that in order to enable the Court to find out the truth and render a just decision the salutary provisions of Section 311 are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. Opportunity of proving shall be given to other party.

8. I also refer to the judgment of the Hon'ble Supreme Court in the case of **RAM SINGH VS. COL. RAM SINGH reported in AIR 1986 SC 3** particularly paragraph 32 on page 11 where the Hon'ble Apex Court has laid down the principles regarding admissibility of a tape recorded statement. Paragraph 32 of the said judgment reads as under:

> “para 32 – Thus, so far as this Court is concerned the conditions for admissibility of a tape recorded statement may be stated as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

The Court will also consider the aforesaid principles while considering the authenticity of the CD in this behalf.

9. In my view the entire procedure adopted by the trial court was contrary to and inconsistent with the rules of evidence and therefore this revision application is partly allowed by quashing the impugned order under challenge. In this behalf I have considered the judgments of the Hon'ble Apex Court in the cases of (1) **N.Sri Rama Reddy and others vs. Shri V.V.Giri (supra), (2) Yusufalli Esmail Nagree vs. State of Maharashtra (supra), (3) Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdas Mehra (supra) and (4) R.M.Malkani vs. State of Maharashtra (supra).** Over and above I have also

considered several provisions of Evidence Act which I have referred in my conclusion and also judgments of Hon'ble Apex Court in the case of **State of Bihar and others vs. Sri Radha Krishna Singh and others (supra)**, judgment of this Court in the case of **State of Gujarat vs. Gaurang Mathurbhai Leuva (supra).**

10. In view of the same, the following conclusions can be arrived at.

10.1 The trial Court has committed serious error in allowing the application Exh.292 and thereby permitting the defence to produce the CD in question and play the same on a CD player before the trial Court.

10.2 The trial Court has committed serious error in not considering the fact that the CD has not been prepared and preserved safely by an independent authority like police, but the same has been produced by the accused persons.

11. In view of the same, this Criminal Revision Application is partly allowed. The impugned order passed by the trial Court is quashed and set aside.

The learned trial Judge is requested to consider the application Exh.292 afresh after considering the observations made by this Court and decide the same in accordance with law, as early as possible preferably within two months from the date of receipt of the writ of this Court. Rule is partly made absolute to the aforesaid extent.

12. Before I part with the the judgment, this Court is extremely grateful to Shri K.C. Shah, learned APP, Shri Yogesh Lakhani, learned advocate for the original accused and Mr. J.B. Pardiwala, learned advocate for the complainant who have very ably assisted this Court in resolving the complicated question of law in this matter.

12A. The office to send the writ forthwith as accused are in jail.

(K.M. Mehta, J.)

syed/pkn